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IN THE

SUPREME COURT OF THE UNITED STATES.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,
Petitioner,

vs.

AMERICAN FRUIT GROWERS, INC., and WILSON A. TAYLOR, Judge,
Respondents.

No. 376.

BRIEF OF PETITIONER.

STATEMENT.

The question in this case for decision is whether service may be had by attaching the property of a nonresident defendant carrier in an action based upon the Carmack Amendment for damages presumed to have occurred upon the line of the delivering carrier. It is the contention of petitioner that since service by such attachment is not permissible in the federal courts, and the right of action is predicated upon a

federal statute, the attachment law of the state cannot be restorted to, since to do so would affect substantive rights rather than matters of mere procedure.

The American Fruit Growers, Inc., filed in the Circuit Court of St. Louis, Missouri, against the St. Louis, Brownsville & Mexico Railway Co. a purported cause of action in three counts for alleged damage to shipments of cabbage originating on the line of said railway company in the State of Texas, consigned to points on the lines of connecting carriers outside the State of Texas. The said railway company operates only in the State of Texas, and has no agent in the State of Missouri.

The only service was by attaching interline accounts due the defendant carrier by other railroads on whom service could be had in the City of St. Louis. On this service the Circuit Court attempted to assume jurisdiction, whereupon the carrier applied to the Supreme Court of Missouri for a writ of prohibition. Return was made to this writ, admitting the substantial allegations, but specifically denying that the petition in the state court was based upon the Carmack Amendment and specifically denying that the federal law prohibited the beginning of such a suit against such a nonresident defendant by attachment and without personal service.

These issues were fully briefed, argued and submitted to the Supreme Court of Missouri, which court held that the petition was based upon the Carmack Amendment, but the Court upheld the right to institute such a suit by attachment. The correctness of this latter ruling is challenged on the ground that it violates both the due-process clause and the commerce clause of the Federal Constitution. In its application for certiorari petitioner assigned as errors committed by the Supreme Court of Missouri the following:

I.

That the decision of said Supreme Court was in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States delegating to Congress the power to regulate commerce between the several states, and that, in permitting the plaintiff in the cause in the Circuit Court to resort to the aid of state statues, thereby adding to and supplementing the substantive rights afforded by the federal laws, the Court contravened the rule announced by this Court in the cases of

Ry. Co. v. Varnville, 237 U. S. 604, and
Ry. Co. v. Winfield, 244 U. S. 153.

II.

That the Supreme Court of Missouri, in treating as a mere matter of procedure the attachment of the property of a nonresident defendant, without personal service upon it in a suit based upon the Carmack Amendment to the Interstate Commerce Act, ignored and contravened the principles announced in the cases of

Pryor v. Williams, 254 U. S. 43, and
White v. Ry. Co., 238 U. S. 511.

III.

That the decision of the Supreme Court of Missouri is also in conflict with and opposed to the decision of this Court in the case of

Davis, Dir. Gen., v. Farmers Equity Co., 43 Sup. Ct. Reporter, No. 15, p. 556.

BRIEF.

I.

The Carmack Amendment having superseded all state laws as to proceedings for damages to interstate shipments, the right of defense by carriers sued on causes of action arising under the act is a substantive right which cannot be defeated or abridged by a state statute.

Davis v. Wechsler, Vol. 44, Sup. Ct. Rep. No. 2, p. 13 (Advance Sheets);
Davis v. Farmers Equity Co., Vol. 43, Sup. Ct. Rep. No. 15, p. 556;
White v. Ry. Co., 238 U. S. 511;
Prescott v. Ry. Co., 240 U. S. 641;
Lysaght v. R. R. Co., 254 Fed. Rep. 353;
Riverside Mills v. Ry. Co., 219 U. S. 206.

II.

Federal laws govern as to actions against nonresident defendants under said act, and there should be no proceeding without personal service.

Varnville v. R. R., 237 U. S. 597;
Pratt v. Ry. Co., 284 Fed. Rep. 1007;
Haddock v. Haddock, 201 U. S. 562;
Davis v. Farmers Equity Co., Vol. 43, U. S. Sup. Ct. Rep. 556;
Pennoyer v. Neff, 95 U. S. 726;
Coal Co. v. Read, 229 U. S. 38;
Laborde v. Ubani, 214 U. S. 174;
Levy v. Fitzpatrick, 15 Pet. 171.

ARGUMENT.

A transitory right of action created by a Federal statute, in the absence of limitations to the contrary, may be enforced in the state courts, but, as we shall hereafter attempt to show, the state courts, in enforcing rights based upon such Federal statutes, must respect all substantive rights that the defendant would be entitled to were the action being prosecuted in the Federal courts. Personal service, as opposed to service in transitory actions by so-called foreign attachment, is, in our opinion, a matter of substance rather than one of mere procedure, and if we are correct in this assumption, it follows that suits in the state courts based upon the Carmack Amendment or the Federal Employers' Liability Act cannot be begun in a manner contrary to the well-established policy of the Federal law. Rights based on the Carmack Amendment alone are involved in this action; hence, it is appropriate at the very outset to briefly consider the nature of this statute and of the rights which it affords.

Nature of the Right of Action Created by the Carmack Amendment.

The Carmack Amendment to Section 20 of the Interstate Commerce Act (34 Stat. L. 584) provided:

> "That any common carrier, railroad or transportation company receiving property for trans-

portation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

The first and second Cummins Amendments and the Transportation Act have each added new provisions, but the language of the original Carmack Amendment continues substantially unchanged.

The Carmack Amendment partakes both of the nature of a right of action and a remedy. In the case

of Ry. Co. v. Riverside Mills, 219 U. S. 206, the Court, discussing this question, said:

> "The liability of the receiving carrier which results in such a case is that of a principal for the negligence of its own agents. * * * It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

In Ry. Co. v. Wallace, 223 U. S. 491, the Court, after reaching the conclusion that an action based on the Carmack Amendment was transitory, and that such a suit could be prosecuted in the state courts, said:

> "This presumption would be strengthened as to a statute like this passed, **not only for the purpose of giving a right, but affording a convenient remedy.**"

In Adams Express Co. v. Croninger, 226 U. S. 503, discussing the proviso to the effect that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, the Court (on page 507 of the opinion) said:

> "To construe this proviso as preserving to the holder of any such bill of lading any right or

> remedy which he may have had under existing federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

Discussing this same question, and citing authorities in support thereof, Judge Hand, in the case of Lysaght v. Ry. Co., 254 Fed. 353, said:

> "The phrase 'existing law' means existing common law as understood in the federal courts, and excludes changes effected by state statutes."

The Supreme Court of Missouri has very properly held that the action filed in the state court is predicated upon the Carmack Amendment rather than upon the common law. If, however, it can be contended that it is a common-law action for damages, it must be the common law of the federal courts, for it concerns an interstate shipment, and a suit based upon such a federal common-law right, like the suit based upon a federal statutory right, is acquired subject to all substantive rights that could be availed of by the defendant in the federal courts. It is immaterial, therefore, whether the action is predicated upon the Carmack Amendment or the federal common law applicable to interstate ship-

ments, as in either event, Congress having taken jurisdiction over the subject matter, the state statutes and the state common law vanish.

Again quoting from the Croninger case, supra (226 U. S. 505):

> "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading, which he must issue, and limits his power to exempt himself by any rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state legislation with reference to it."

The Carmack Amendment has, therefore, entirely superseded the statutes and common law of the state with respect to suits for damage to interstate shipments, except in so far as said state statutes and state common law afford a mere method of procedure for the purpose of enforcing the federal rights and violate no substantial right of the defendant accorded by the federal law. A plaintiff can enforce his federal rights in the state courts and can adopt the pleading and practice of the state courts in so far as this does not prejudice substantial federal rights of the defend-

ant, but with respect to matters of substance, as distinguished from matters of practice, the state law has, as it were, been entirely wiped out of existence.

Under the Federal Rule, Attachment Cannot Be Maintained Unless the Court Has Jurisdiction Over the Person of the Defendant.

In Big Vein Coal Co. v. Read, 229 U. S. 38, the Court, citing and following a well-established line of federal decisions, said:

> "We think the rule has not been changed: That an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a federal court."

In Laborde v. Ubarri, 214 U. S. 174, Judge Holmes, speaking for the Supreme Court, said:

> "In the courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' * * * 'Unless the suit can be maintained' means, of course, unless the Court has jurisdiction over the person of the defendant."

In the much-cited case of Ex Parte Railway Company, 103 U. S. 796, the Court said:

> "It is conceded that the person against whom this suit was brought in the Circuit Court was

an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and unless he could be sued no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

In Levy v. Fitzpatrick, 15 Pet. 171, the Court said:

"By the Eleventh Section of the Judiciary Act of 1789, it is enacted, * * * 'and no civil suit shall be brought before this Court, against an inhabitant of the United States, by an original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.' The construction given by this Court to these provisions is that no judgment can be rendered by a Circuit Court against any defendant who has not been served with process issued against his person, in the manner here pointed out, unless the defendant waive the necessity of such process by entering his appearance to the suit."

In the leading and much-cited case of Toland v. Sprague, 12 Pet. 329, et seq., the Supreme Court said:

"Nothing can be more unjust than that a person should have his rights passed upon and finally decided by a tribunal without some process being served upon him by which he will have

notice, which will enable him to appear and defend himself. This principle is strongly laid down in Buchanan v. Rucker, 9 East. 192. Now, it is not even contended that the circuit courts could proceed to judgment against a person who was domiciled without the United States and not found within the judicial district, so as to be served with process, where the party had no property within such district. We would ask what difference there is, in reason, between the cases in which he has and has not such property? In the one case, as in the other, the Court renders judgment against a person who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction and upon whom they have no power to cause process to be personally served. If there be such a difference we are unable to perceive it.

* * * * * * *

"With these views we have arrived at the same conclusions as the Circuit Court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the Circuit Court can issue no process beyond the limits of their districts. 2. That, independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of Congress adopting the state process adopt the form and modes of service only so far as the persons are rightfully within the reach of

such process, and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts. 4. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court in personam; that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add that even in case of a person being amenable to process in personam an attachment against his property cannot be issued against him except as part of or together with process to be served upon his person."

Personal Service, as Distinguished From Service by Foreign Attachment, Is a Substantive Right Rather Than a Mere Matter of Procedure.

A very full distinction between substantive rights and mere matters of practice and procedure is found in the case of Pritchard v. Norton, 106 U. S. 128 to 136, inclusive, and on page 129 of the opinion the Court lays down this rule:

"The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country, but whatever goes to the substance of the obligation and affects the

rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

Discussing the application of this rule to suits in the state courts based on the Federal Employers' Liability Act, the Supreme Court of the United States in Ry. Co. v. White, 238 U. S. 511, said:

"There can, of course, be no doubt of the general principle that matters respecting the remedy —such as form of action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. * * * **But matters of substance and procedure must not be confounded because they happen to have the same name.** * * * As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted, the state court can, in those and similar instances, follow their own practice, even in the trial of suits arising under the federal law. But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure."

In Ry. Co. v. Gray, 241 U. S. 338-9, the Court, reannouncing the same rule, said:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend

upon it and **applicable principles of common law as interpreted and applied in federal courts.**"

The language last above quoted is again used by the Supreme Court of the United States in Ry. Co. v. Harris, 247 U. S. 371.

In the case of Slater v. Ry. Co., 194 U. S. 126, Judge Holmes, speaking for the Supreme Court of the United States, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligations, * * * but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. * * * Therefore, we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The case of Ry. Co. v. Prescott, 240 U. S. 641, involved the application of a Texas statute which undertook to place upon the carrier the burden of proving that damage from fire occasioned while it

held the property under the liability of a warehouseman was not caused by its negligence, and in passing on this question the Court, to quote from the syllabus, held:

> "If the loss admittedly occurs by fire, the burden is upon the plaintiff to prove negligence, notwithstanding the rule may be different under state law."

Reannouncing this rule in the very recent case of American Railway Express Co. v. Levee, decided October 22, 1923, the Court said:

> "The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law."

If, in the trial of a case based on the Carmack Amendment, burden of proof is to be considered as a substantive right rather than a mere matter of procedure, how much more justification is there for holding that the right of the defendant to be personally served, rather than to be brought into court by foreign attachment, is a substantive right of which he cannot be deprived by the state courts.

In the recent case of Davis v. Farmers Co-op. Equity Co., 43 U. S. Sup. Rep. 556, decided subsequent to the opinion of the Supreme Court of Mis-

souri now under review, this Court held that the law of the state permitting service upon the soliciting agent of a nonresident railroad involved more than mere matters of practice and procedure, and affected substantial rights not only of the carrier, but of the public in general, in derogation of the commerce clause of the Constitution.

It would seem by analogy that service by attachment under substantially similar circumstances must likewise affect substantive rights, for the burden on interstate commerce is as obnoxious in the one instance as in the other.

In the still more recent case of Davis v. Wechsler, decided October 22, 1923, 44 Sup. Rep. 13, this Court, in reversing a decision of the Missouri courts wherein alleged local procedure was invoked for the purpose of obtaining service in a manner violating substantial federal rights, said:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

In the case of Harland v. Tel. Co., 40 Fed. 311, the Court, in emphasizing that such jurisdictional matters involve substantive rights, rather than mere forms of practice and procedure, cites with approval the following quotation from Butler v. Young, 1 Flip. 276:

> "Care and caution will be used that substantive rights given by the state laws shall not be confounded with what is mere practice in the state courts. In this connection I may mention, among other matters, **the right to bring an absent or nonresident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the state**, and, in my opinion, were not contemplated by Congress, by the law in question, to be given to parties in this court."

Judge Morris, in Pratt v. Ry. Co., 284 Fed. 1007, reaching the same conclusion with respect to facts identical to those in the case at bar, said:

> "I believe that the right to bring an absent or nonresident defendant into court by publication or personal service outside the state affects the substantive rights of the defendant."

It is apparent from the foregoing decisions that the initial carrier, in an action based upon the Carmack Amendment, cannot be sued in any federal court other than one in which personal service can be ob-

tained. This is the right which the federal law gives to the plaintiff, and the obligation that it imposes upon the defendant. Can it be said that the State Legislatures can go further and add to this federal right the further right that Congress has not seen fit to grant, namely, a right to sue in a jurisdiction in which defendant is not doing business? An argument in support of an analogous contention was advanced in Ry. Co. v. Varnville, 237 U. S. 597, with respect to a state statute which undertook to impose a penalty for failure to promptly settle loss and damage claims. Pointing out the illegality of this statute when applied to interstate commerce, the Court said:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The Supreme Court of the United States, in Haddock v. Haddock, 201 U. S. 562, held that the full faith and credit clause of the Constitution does not require one state to respect the judgment of another state based upon service by publication. It follows from this that personal service must be a substantive right rather than a mere matter of procedure, for certainly no court has ever held that full faith and credit should not be given to the judgment of a for-

eign state merely because of the practice and procedure in the trial of the case which led to the judgment. As to such matters of practice and procedure the judgment is conclusive, but with respect to such substantive rights as that of personal service the judgment is not conclusive.

The well-defined policy of the federal law is thus stated in the leading case of Pennoyer v. Neff, 95 U. S. 726:

> "If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

This is exactly what has happened and what will continue to happen so long as the initial carrier can be dragged into foreign jurisdictions by reason of state statutes authorizing attachment without personal service.

As a matter of fact, nothing could be more high-handed and unjust than to require some small road which has perhaps received only a few dollars revenue, to employ attorneys, transport witnesses across the country at its own expense, and appear in some distant jurisdiction to defend the rights of other carriers against claims for damage due to no fault of its own. It is enough that it be required to defend such suits in jurisdictions where it employs salaried attorneys, but when called upon to defend such suits in foreign jurisdictions, the attorney's fees and other nontaxable costs frequently exceed the amount of the claim, and there is no provision in the Carmack Amendment permitting the initial carrier, whether successful or unsuccessful in the outcome of the litigation, to collect these nontaxable costs from the connecting carriers. The injustice of such a situation is too apparent to need further argument, and not only deprives the carrier of its substantive rights to the extent of violating the due-process clause of the Constitution, but likewise places a substantial burden upon interstate commerce.

Service by foreign attachment is not permissible in the Federal Courts, and suits based on the Carmack Amendment, at least in so far as substantive rights are concerned, must be controlled by "applicable principles of common law as interpreted and applied in

Federal Courts." These rights cannot be enlarged by state statutes permitting service by attachment.

In this connection we quote the following from the dissenting opinion of Judge Graves, of the Missouri Supreme Court, in this case:

> "The right to sue out an attachment is a substantive right and is not mere procedure. Especially is this true when attachment is used to obtain jurisdiction. * * * So if the acquisition of jurisdiction by attachment is substantive law, and, in view of the rulings supra we think it is, then the statutes or rules of the state do not control, but the Federal rule must be applied by the State Courts. If jurisdiction by foreign attachment is denied by Federal rule, then it must be denied by the state trying a case arising under a Federal law, notwithstanding the state rule or state statute may be different. By the Federal rule an attachment is merely an incident to the suit and personal service must be obtained. If the State Court undertakes to try a case arising under a Federal law it must follow the Federal rule in matters of substantive law."

The observations of Justice Brandeis in the

Farmers Co-Operative Equity Case,

are also pertinent:

> "Orderly effective administration of justice clearly does not require that a foreign carrier

shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use (citing cases). Avoidance of waste, in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

It is respectfully submitted that the judgment of the Missouri Court should be reversed.

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